IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GLEN A. CRITES,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner for Social Security,

Defendant.

OPINION AND ORDER

05-C-0648-C

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Plaintiff Glen A. Crites has filed objections to the report entered by the United States Magistrate Judge on June 23, 2006. He challenges the magistrate judge's recommendation to affirm defendant commissioner's decision to deny plaintiff's application for benefits under the Social Security Act. Plaintiff contends that the magistrate judge erred in a number of respects: (1) he did not adequately account for the administrative law judge's failure to evaluate plaintiff's application properly in light of the report of the treating physician that incorporated the Functional Capacity Evaluation and he failed to give sufficient weight to that evaluation; (2) he did not address the weight that should be given the opinion of plaintiff's treating physician; (3) he did not address plaintiff's arguments about his

independent medical examination; (4) he failed to acknowledge the administrative law judge's failure to assess the case in light of SSR 97-7p (it appears that plaintiff means to refer to SSR 96-7p), as required by law; (5) he recommended affirmance of the commissioner's denial of benefits because he believed that plaintiff would have little or no chance of success if his application were remanded even though he admitted that plaintiff was correct in his interpretation of the legal standards and relevant law; (6) he resorted to speculation in finding that one could deduce from the administrative law judge's decision the gist of his reasons for rejecting any relevant non-exertional limitations on plaintiff's functional capacity evaluation; (7) he overlooked the administrative law judge's "obvious legal error," Plt.'s Objs., dkt. #14, at 9, in finding plaintiff credible but concluding at the same time that plaintiff's pain complaints were overstated; and (7) he did not review the administrative law judge's failure to take SSR 96-8p and its requirements into consideration and discuss why reported symptom-related functional limitations and restrictions could or could not be accepted as consistent with the medical and other evidence.

Plaintiff's flurry of objections to the magistrate judge's recommendation would suggest that plaintiff's case was a complex one. It is sad, but not complex. Plaintiff is a young man (24 at the time of the hearing before the administrative law judge), who had a minor back injury while working at a water park in 2002. Although none of the doctors who examined him in the early months after his injury could find any injury more significant than

a mild strain, plaintiff continued to complain of severe pain that prevented him from working at a job or even around his home. X-rays, an MRI, a bone scan and several physical examinations disclosed no abnormalities or condition that might account for continued pain. The examining doctors noted that plaintiff's lack of exercise and fear of re-injuring his back were contributing to his discomfort and that plaintiff seemed unwilling to think about employment. Dr. Oh, a rehabilitation specialist, noted that although plaintiff said he was unable to do any work at all, an examination of plaintiff revealed dirt under his nails and on his hands and a scraped palm. Earlier, he noted that although plaintiff complained of pain during various tests Oh asked him to perform, he "did not appear to have any significant difficulty moving around on the examining table." Tr. at 125. Dr. Holmen noted that in mid-September 2002, plaintiff reported that he was planning on changing the motor in his car the following weekend. Throughout the doctors' notes, there are reports of requests by plaintiff's mother to write work restrictions for plaintiff or to find him disabled for worker's compensation purposes, as well as efforts by her to cover up for her son. For example, when Dr. Oh noted the dirt under plaintiff's nails, it was his mother that broke in and explained that plaintiff had checked her oil that morning. When Dr. Oh asked plaintiff why he had not returned to physical therapy as instruction, plaintiff's mother interjected that it was because she was the only one who could drive him and she was too busy to take him. (Despite the indications that plaintiff did not attend many of the recommended physical

therapy sessions, some of plaintiff's later reports seem to have adopted plaintiff's statement that he had completed a course of physical therapy.)

Against this backdrop, the administrative law judge gave plaintiff an enormous favor when he treated him as capable of performing only sedentary work, the least strenuous work classification. The administrative law judge then relied on the Social Security grids to find plaintiff capable of performing a full range of sedentary work. Now, plaintiff says that this was error because the administrative law judge did not undertake an adequate evaluation of the treating physician's report (I assume he means Dr. Leonard's report), which incorporated the Functional Capacity Evaluation, or address the weight that should be given to the treating physician's opinion.

First, as the magistrate judge pointed out, the administrative law judge must have considered the Functional Capacity Evaluation; had he not, he would have had no reason to place plaintiff in the sedentary classification. No other report would have supported that classification. Second, as for the administrative law judge's failure to explain why he rejected any non-exertional limitations on plaintiff's ability to perform the full range of sedentary work, the magistrate judge explained that the reason is apparent in the record. The only source for such findings is the Functional Capacity Evaluation, which is based entirely on plaintiff's subjective complaints of his pain. In this respect, the Functional Capacity Evaluation is not like the one discussed in Barrett v. Barnhart, 355 F.3d 1065, 1067 (7th

Cir. 2004). In Barrett, the physical therapist who produced the evaluation based it on physical tests and observations and not just on the claimant's reports of his pain. In this case, plaintiff's extensive medical reports refute the conclusion that plaintiff was not capable of performing the full range of sedentary work. Third, the Functional Capacity Evaluation was prepared by a physical therapist and not be a doctor; it explicitly disavowed setting out any restrictions but confined its evaluation to "guidelines." Fourth, it is not clear that Dr. Leonard qualifies as plaintiff's "treating physician," entitled to the highest level of deference among the medical providers that saw plaintiff. Even if he should be considered as the treating physician, it is overstating matters to allege that he "endorsed" the Functional Capacity Evaluation. His own opinion was that as of February 7, 2003, plaintiff could stand and walk at least four hours in an eight-hour workday, sit for at least four hours and lift ten pounds on a frequent basis. Tr. at 175.

The administrative law judge made it clear in his decision that he found the level of objective pain overstated by plaintiff and "therefore not a reliable measure of his residual functional capacity." Tr. at 17. This was sufficient to explain his rejection of the functional capacity evaluation's assessment of plaintiff's alleged non-exertional needs(a sit-stand option and no stooping (bending forward from the waist)), since the evaluator had relied solely on plaintiff's own statements of his pain levels.

Plaintiff contends that the magistrate judge should have addressed the administrative

law judge's failure to discuss plaintiff's arguments about his independent medical examination. Plaintiff raised this issue for the first time in his reply brief, which would be reason enough for the magistrate judge not to address it. In any event, there is little to address. Plaintiff's only argument was that the independent medical examiner (Dr. Barron) could not be objective because he was hired by the plaintiff's employer's insurance carrier. Such employment does not make a doctor's testimony incredible in and of itself. In this instance, Dr. Barron's opinions closely tracked those of other doctors who examined plaintiff. Dr. Barron found no objective signs of injury; he noted that plaintiff had inconsistent findings on examination, such as showing some mild restrictive motion in the standing position but being able to sit on an examining table with his back at 90 degrees to his legs, and that he exhibited features of pain and symptom magnification. Tr. at 170.

As to the administrative law judge's credibility assessment, plaintiff contends that it was suspect because he failed to assess the case in light of SSR 97-7p. I assume he means SSR 96-7p because he cites Golembiewski v. Barnhart, 322 F.3d 912, 914 (7th Cir. 2003), a case in which the court relied relied on SSR 96-7p for the proposition that an administrative law judge must supply "specific reasons" for a credibility finding and cannot state merely that "the individual's allegations have been considered" or that "the allegations are (or are not) credible." Although the administrative law judge did not cite SSR 96-7p, he followed its directives when he set forth explicit reasons for not finding plaintiff's allegations

of severe pain credible.

Plaintiff objects to the magistrate judge's statement that "plaintiff stands no chance of success on his claim that the ALJ committed reversible error by failing to mention the FCE." R&R at 12. Plaintiff says the magistrate judge cited no case law to support his position that the reviewing court has the right to decide the likelihood or the unlikelihood of success remand. No citation was necessary. The magistrate judge explained that remand was not necessary to insure that the administrative law judge considered the Functional Capacity Evaluation because it was obvious that the administrative law judge *did* consider it. Not only was it in front of him at the hearing but plaintiff's counsel questioned plaintiff about it and made a legal argument relying on it.

Plaintiff accuses the magistrate judge of resorting to speculation when he found that one could deduce from the record the gist of the administrative law judge's reasons for rejecting plaintiff's argument that his non-exertional limitations made reliance on the grids unreasonable. In plaintiff's view, the administrative law judge should have called a vocational expert to provide testimony about the availability of jobs in the work force that plaintiff could perform in light of his need for a sit-stand option and his inability to stoop more than 10% of the day. No speculation was required; the reasons are obvious in the record, as I have explained. Would it have been helpful if the administrative law judge had laid out his reasoning more explicitly? Of course. But when the record is as straightforward

as this one, his failure to do so does not mean that the case must be remanded for further findings.

Plaintiff asserts that the magistrate judge overlooked the administrative law judge's obvious legal error in finding plaintiff credible but at the same time finding that plaintiff's complaints of pain were overstated. There is no "obvious legal error." The administrative law judge did not find plaintiff credible. Instead, he said that plaintiff's testimony was credible "only to the extent that his medically determinable impairment compromises his ability to perform some types of work; however, in light of the reports of his treating and examining practitioners, the medical history, and the hearing testimony, his allegation that he cannot work at all is unsupported." Tr. at 16. The administrative law judge added that "Although the claimant may sincerely believe that substantial limitations exist, I find that he is not credible in the sense of establishing disability in view of the universe of evidence reviewed above." Id. at 17.

In light of these findings by the administrative law judge, the magistrate judge did not have to review the administrative law judge's failure to take into account the requirements of SSR 96-9p and discuss why plaintiff's reported symptom-related functional limitations and restrictions could not be accepted as consistent with the medical and other evidence. The administrative law judge took into account the reports of plaintiff's treating and examining practitioners, plaintiff's medical history and plaintiff's testimony at the hearing

and found that plaintiff had the residual functional capacity for a full range of sedentary work.

Finally, the magistrate judge's discussion of "stooping" was not essential to his recommendation. Therefore, it is unnecessary to discuss whether he erred in finding that, although the functional capacity evaluation would limit plaintiff's stooping capacity to 1-10% of a day, this was close enough to the 11-33% of the day that most unskilled sedentary jobs require to make it a non-issue.

ORDER

IT IS ORDERED that the magistrate judge's report and his recommendation are ADOPTED. FURTHER, IT IS ORDERED that the decision of defendant Jo Anne Barnhart, Commissioner of Social Security, denying plaintiff Glen A. Crites's application for benefits under the Social Secuirty Act is AFFIRMED.

Entered this 25th day of August, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge